IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10815 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PRATAPSING BUDDHSING RATHOD

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 10815 of 2001

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MR MK PATEL, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 21/02/2003

ORAL JUDGEMENT

#. By filing this petition, the petitioner-detenu has

challenged his detention order dated 17.10.2001. By the impugned order, the petitioner-detenu is detained in exercise of the powers under section 3(1) of the Gujarat Prevention of Antisocial Activities Act,1985 (hereinafter referred to as "the PASA" for short), as, the detaining authority found that the detenu is a "bootlegger" and is required to be detained under the preventive detention, so that, he may not continue with such type of illegal activities.

#. Along with the detention order, the detenu was also served with the grounds of detention. It is alleged against the petitioner that, he is dealing in illicit liquor as well as he is dealing in Indian made foreign liquor. In the grounds of detention, the statements of certain witnesses have been recorded, who have stated that the petitioner is disturbing the peace in the area and, because of his illegal activities the atmosphere in the are is also disturbed.

#. The aforesaid order is challenged by the petitioner mainly on two grounds. It is argued by the learned advocate for the petitioner that even though the statements of witnesses were recorded on 15.10.2001, which were verified by the authority on 16.10.2001 and immediately on the very next day, the order is passed, i.e. on 17.10.2001. For that purpose, the learned advocate for the petitioner relied upon the judgment in the case of Ranubhai Bhikhabhai Bharwad (Vekaria) v. State of Gujarat and others, reported in 2000(3) GLR 2696, wherein in para 9, the Court has observed as under.:

"Learned Asstt. Government Pleader has submitted that in the instant case, the proposal was made by the sponsoring authority on 27th August 1999. However, he is not in a position to say as to on what date it was received by the detaining authority itself. However, one fact is established that the verification of the witnesses has been made by the detaining authority on 29th August, 1999, and therefore, it must have reached the detaining authority at least on 29th August 1999 and on the next day, i.e., on 30th August 1999, the detention order has been passed. An identical situation had come up before a Division Bench of this Court in the case of Kalidas C.Kahar v. State of Gujarat & Ors., reported in 1993(2) GLR 1659. In para 6 of this decision at page 1662, the contention has been dealt with that the detaining authority had

wrongly exercised the power under Sec. 9(2) of the P.A.S.A. Act and by such wrong exercise of powers the detenu's right to make a representation under Art. 22(5) of the Constitution of India had been infringed. It was also considered that by statements of the witnesses had been recorded on 15th October, 1992 and the said statements had been verified by the Supdt. of Police 'C' Division, Baroda City on 16th October, 1992. The proposal in the case was made on 16th October 1992 and the order of detention was passed on 17th October 1992. The Division Bench noticed that it was rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. It has been further observed that at the time of exercising the privilege under Sec.9 (2) of P.A.S.A., a balance is required to be struck between the public interest on the one hand and the right of the detenu to make a representation under Art.22 (5) of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and/or whether their statements are bogus statements or not? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Sec.9 (2) carved out on the basis of Art.22 (5) of the Constitution which provides that nothing in sub-sec.(1) shall require the authority making such order to disclose facts which it considers to be against the interest to disclose. The Division Bench has held that it is the duty of the detaining authority to strike a balance as stated above, that in public interest the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do

some exercise before actually exercising the privilege under Sec.9 (2) of the P.A.S.A. The Division Bench found in the facts and circumstances of the case before it that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Sec.9 (2), as the proposal was made on 16th October 1992 and the order of detention was passed on the following day, i.e. 17th October 1992, nor is there any material to show as to how he examined the necessity of exercising the power under Sec.9 (2). Under the circumstances, the Division Bench held that it was a wrong exercise of power under Sec.9 (2) which has affected the detenu's right of making an effective representation under Art.22 (5) of the Constitution of India, and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order was bad and illegal. The facts of the present case are in close proximity to the facts which were considered by the Division Bench in the aforesaid case inasmuch as it has already been pointed out that the statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1992, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August, 1999 the detention order has been passed. Therefore, I find that identical fact situation as was obtaining in the case before the Division Bench is there, and it is a case of wrong exercise of power under Sec. 9(2) of the Act because the detaining authority had no sufficient time for the purpose of verification of the facts which

were required for the purpose of satisfaction to invoke privilege under Sec. 9(2). Merely because in the facts before the Division Bench the proposal itself was made on 16th October, 1992 and the order was passed on 17th October, 1992 and in this case the proposal was made on 27th August, 1999, the verification of the statements were made by the detaining authority on 29th August, 1999 would not make any difference. Such a difference of a day or two here and there is hardly sufficient to inspire confidence that the detaining authority had the sufficient time for the purpose of verification of the facts which are necessary to lead to invoking the privilege under Sec. 9(2) of the Act. In this case also the manner in which the verification has been recorded of the statements made by these three witnesses for the purpose of Sec. 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Sec. 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power under Sec. 9(2) and it is established that in such cases, the wrong exercise of power under Sec. 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Art. 22(5) of the Constitution of India. This Court quite appreciates in such cases the predicament or the dilemma of the detaining authority inasmuch as, when the action is taken promptly, it is argued that the action has been taken in a hot haste and if the same is taken after lapse of some time, it is said that the action is delayed, and therefore, the same stands vitiated. In order to combat this argument, the Division Bench has rightly observed that a balance has to be struck in such cases between the public interest and the right of the detenu

> to make an effective representation. The detaining authority is, therefore, required to act in such a manner that this balance is maintained. Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Sec. 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August 1999, i.e., on the next day to the date on which the materials were considered by the detaining authority. In this regard, decisions of this Court rendered in different cases on different dates, but I find that it is not necessary for me to deal with all those unreported decisions insofar as this point is concerned, the matter stands fully covered by the Division Bench decision to which the reference has been made hereinabove."

#. It is argued that, in view of the decision of this Court referred to above, the order which is passed on the very next day after verification of the statements can be treated as an order passed in a mechanical manner, as, according to the petitioner, the detaining authority might not have time to verify all those documents within one day. It is also argued that even though the petitioner was in police remand at the relevant time, yet the detention order is passed against him. It is submitted that, the authority has not properly considered the fact as to why still it is necessary to detain the petitioner by way of preventive detention when the petitioner is in police remand/police custody. For that purpose, learned advocate has relied upon the decision of the Apex Court in the case of Amritlal and other Vs. Union Government, reported in AIR 2000 SC 3675, wherein

the Apex Court in paras 4, 5 and 6 observed as under.:

"4. In Augustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 CriLJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

5. It is this reasoning which the learned advocate contended that the High Court should have held to be completely erroneous in the matter of being the basis of an order of detention.

6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is `likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the `likelihood of his moving an application for bail' which is different from `likelihood to be released on bail'. This reasoning, in our

view, is not sufficient compliance with the requirements as laid down."

#. Mr.Patel, learned AGP, however, tried to justify the detention order even though the petitioner is in police custody. In the detention order, the detaining authority has stated that the petitioner may be released on bail after the police remand is over, however, the authority has not stated as to on what basis the authority has reached the said conclusion. In that view of the matter and in view of the aforestated judgments, the order of detention is required to be quashed and set aside.

#. In view of what is stated above, the petition is allowed. The order of detention dated 17.10.2001 is quashed and set aside. The detenu Pratapsing Budhdhsing Rathod is ordered to be set at liberty forthwith if he is not required in connection with any other case. Rule is made absolute accordingly.

(P.B.Majmudar,J)
(pathan)